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Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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Re: STB Docket No. 699: *Assessment of Mediation and Arbitration Procedures*

Dear Ms. Brown:

This is in response to the STB's request at its August 2, 2012 hearing for comments from BNSF on questions at the hearing concerning BNSF's Montana ADR Program.

As BNSF stated in our comments, our experience has been that a successful arbitration program is one that covers a discreet, well-defined area of disputes and provides clear guidelines for neutral and qualified decision-makers to apply. During the hearing, there were several questions from the Board members regarding the Montana ADR program that BNSF developed with the Montana Grain Growers Association ("MGGA") and the Montana Farm Bureau Federation ("MFBF") (collectively, "Producer Organizations" or "ProOrgs"). These two grassroots organizations have strong connections to the Montana farming community through their grain producer members and leadership, as well as an extensive history of working with BNSF to improve our mutual understanding of agriculture and transportation issues. Our joint Montana ADR program, which capitalizes on that cooperative relationship, has the key attributes of a successful arbitration program—it provides a mechanism for neutral industry experts to take up a narrow set of disputes and apply specialized, market-based standards to resolve those disputes.

We appreciate the Board's interest in our unique program, as well as the opportunity to provide additional information about it.

Program Background

The Montana ADR program was launched by BNSF, MGGA and MFBF at the beginning of 2009. Prior to that time, BNSF had a history of informally mediating rate and service issues with the Montana ProOrgs and their members. BNSF, MGGA and MFBF identified an opportunity to build on this relationship and create a more formal mechanism for addressing rate issues with the Montana farmer community in a fair and expeditious manner. Its procedural elements include:

- The ADR program is available to all members of the Producer Organizations shipping wheat or barley in Montana where their commodity is being shipped more than 250 miles from a BNSF-served origin elevator to a BNSF-served destination. ProOrg members, who are farmer producers and not rail shippers, are empowered by the ADR program to bring challenges to the level of BNSF's rates on these qualifying movements outside the STB's rate reasonableness review process reserved for shippers.
- The ADR program includes a two-tier structure of mediation followed by arbitration. Upon identification of an eligible rate dispute, there is an initial 30-day mediation period that requires an in-person meeting between BNSF and ProOrg representatives, and the producer member if he/she wishes to attend. Any party may request that the ProOrg designate a mediator to attend the session.
- If the parties, after using their best efforts to negotiate a resolution to the dispute, are unable to reach resolution, the parties move forward to a formal arbitration where the member is represented by the ProOrg. Arbitration proceedings are held before a panel of three arbitrators selected from an existing pool of qualified arbitrators. Where the parties are unable to agree, each party selects an arbitrator from the pool and the two arbitrators in turn jointly select a third arbitrator (with a fall-back process of submitting lists until a common individual is found). At the time the program was instituted, BNSF and the ProOrgs entered into agreements with five individuals to make up the pool of potential arbitrators. The arbitrators were selected for their reputation, experience in the agricultural, marketing and transportation field and knowledge of the market conditions impacting the rail shipments covered by the program. The arbitrator agreements require that the arbitrator act fairly and impartially in reaching all decisions.
- Under the rules for arbitration, the panel has the ability to review the level of BNSF's rates on qualifying moves and require a reduction to rates in the form of reparations and lower rates for up to a year. The procedural rules of the National Grain and Feed Association provide a procedural backdrop for the proceedings. However, the Montana ADR rules provide for an expedited 120-day process with limited discovery (e.g., 5 requests for document production and 20 interrogatories, and no depositions). The rules also provide for confidential treatment of information submitted by the parties.

From a substantive standpoint, the ADR program provides arbitrators with specific, market-based factors to address in determining whether a rate is eligible for reduction, including whether competitive alternatives exist, the cost of providing the service, and the capital requirements of the rail system and revenues available to sustain the BNSF network. The ADR program also recognizes Revenue/Variable Cost floors for single car and shuttle rates that arbitrators are required to observe in establishing rate reductions. The program also contains specific instructions regarding how the parties will calculate variable costs for the purpose of the ADR proceedings, including mechanisms to address lag issues that result from using URCS.

Members of the arbitration panel are to issue a reasoned written decision that is binding on all parties. The decisions are to have no precedential effect and arbitrators are instructed not to rely on prior decisions in their deliberations. Unless the parties agree otherwise, a bulletin is prepared by the panel that discloses the identities of the parties, the involved origins and

destinations, and a high-level summary of the panel's reasoning and conclusions, including the amount of any award. Panel decisions are subject to review under the grounds for vacating, modifying or correcting an award provided for by the Federal Arbitration Act.

Program Costs

At the August hearing, the Board members asked specifically about the costs of arbitration under our program. A major common goal of BNSF and the ProOrgs in creating the Montana ADR Program was to offer an avenue for resolving rate disputes that was efficient and low in cost. As part of our agreements with our pool of arbitrators, each arbitrator is paid an annual retainer of \$5000, which is split between BNSF and the ProOrgs. An arbitrator is paid \$200 a day for his/her work on a specific arbitration dispute. In the first instance, BNSF pays the JAMS filing and administrative fees as well as arbitrator fees when the annual retainer is exceeded, with the ProOrg reimbursing BNSF for such fees where relief is not awarded in the proceeding. BNSF and the ProOrgs jointly agreed to a "loser pays" structure to incentivize the parties to make the most of the mediation session and discourage abuse of the process through frivolous claims.

We believe that there are several additional features that contribute to the cost effectiveness of this program for the parties involved. As described in the section above, the proceedings are streamlined, with limited discovery and an accelerated schedule for providing evidence to the arbitration panel. In addition, the parties were also mindful at the outset of providing meaningful direction to the arbitrators by providing the specific standards to be applied in a dispute. BNSF and the Montana Producer Organizations, through extensive discussion, established a list of factors that the arbitration panel members are directed to address in determining whether a freight rate was eligible for a reduction. We believe that providing these mutually agreed to standards to the arbitrators enables them to perform their role in an expeditious way and issue decisions that the parties have confidence in. We were also mindful of establishing discovery and pleading procedures that required the participants to focus on providing the information that arbitrators need to have to carry out their analysis under the prescribed standards.

Finally, the leadership of the Montana Producer Organizations has a key, ongoing role in the ADR process. The ProOrg is responsible for pursuing the claim on behalf of its member, and as part of that representation, makes an initial threshold determination of whether a member's claim has merit. It is only after the ProOrg has determined that the claim has merit that the parties will advance to mediation and arbitration. This threshold determination by the ProOrgs ensures that the resources that the parties have put towards the ADR program are being directed towards resolving legitimate disputes. Their continued participation throughout the proceedings is also intended to incentivize all parties to adopt reasonable positions and make appropriate use of the procedural options provided for in the ADR program.

Key Attributes of Our Montana ADR Program

In BNSF's opening comments submitted in this proceeding on May 17, 2012, we identified 5 key attributes that we view as essential to a successful arbitration program. BNSF believes that these are the same attributes of our voluntary Montana ADR program that make it successful in the eyes of the Producer Organizations and their members, as well as BNSF.

- **Program covers a narrow, well-defined range of disputes.** The Montana ADR program was created to address a specific subset of disputes—transportation rate level

complaints by producer members of the ProOrgs who ship wheat or barley in Montana over certain minimum distances. Focusing on a specific constituency allowed the parties to capitalize on an existing history of collaboration and establish a program geared towards the type and scope of issues relevant to those parties.

- **Program provides clear guidelines for the decision-makers to resolve the dispute.** BNSF and the ProOrgs, through careful and thoughtful deliberation, established clear standards to be addressed by the arbitrators. The program rules list specific market-based factors that the arbitration panel members are directed to address in determining whether a freight rate is eligible for a reduction.
- **Program establishes criteria for selecting decision-makers that will be neutral and qualified.** Under the Montana program, a panel of three arbitrators is selected from a pool of arbitrators that has been established jointly by BNSF and the ProOrgs prior to any specific dispute arising. The arbitrators in the pool were selected by BNSF and the ProOrgs for their reputations, experience in the agricultural, marketing and transportation field and knowledge of the market conditions impacting the rail shipments covered by the program. In addition, all arbitrators are required to act fairly and impartially in reaching their decisions.
- **Program provides for an appropriate level of confidentiality.** The Montana program rules provide for confidential treatment of information submitted by the parties. The standard procedure is for the panel to issue a bulletin describing the identities of the parties, the involved origins and destinations, and a high-level summary of the panel's reasoning and conclusions, including the amount of any award, but the panel and the participants are given flexibility in terms of protecting confidential information submitted in the proceeding.
- **Program adopts a clear and meaningful standard of review of arbitration decisions.** Under the program rules, the panel is required to provide the parties with a reasoned written decision. All panel decisions are subject to review under the grounds for vacating, modifying or correcting an award provided for by the Federal Arbitration Act

In conclusion, BNSF appreciates the Board's interest in creating an arbitration program that will be viewed as fair to all parties and that provides a meaningful and attractive method for resolving disputes in an expeditious way. We also appreciate this opportunity to discuss our Montana ADR program and the attributes that we identified as essential to the creation of a program that meets many of those same goals.

Respectfully submitted,



Richard E. Weicher
BNSF Railway

CC: Chairman Daniel R. Elliott, III
Vice Chairman Francis P. Mulvey
Commissioner Ann D. Begeman